NO. 48796-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DUPREA WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable K.A. van Doorninck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's failure to instruct the jury on duty to render aid denied appellant a fair trial.

2. There was insufficient evidence to support the convictions of first degree assault.

3. The evidence failed to establish a nexus between appellant, a firearm, and the manslaughter charge sufficient to support a firearm enhancement on that offense.

4. Appellant adopts the assignments of error raised in Co-Appellant's brief.

5. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Appellant was charged with manslaughter in the death of one of the participants in a home invasion. Although it was undisputed appellant did not shoot the victim, the State alleged that he was reckless in driving around with the victim rather than taking him to a hospital. Under these circumstances, should the court have given the defense proposed instructions requiring the jury to find appellant had a duty to render aid for the alleged conduct to be reckless?

2. Appellant was charged with two counts of first degree assault, based on a single bullet fired into the front door of the victims' residence, aimed at a downward angle and striking below the door handle. Where there was no evidence the shot was fired with intent to cause great bodily harm, must the convictions of first degree assault and the associated firearm enhancements be dismissed?

3. The court imposed a firearm enhancement on the manslaughter conviction. Where no firearm was ever found, there was no evidence as to whether a gun was present, where the gun may have been, or that a gun was used during the conduct alleged to constitute manslaughter, must the firearm enhancement be vacated for insufficient evidence?

4. Pursuant to RAP 10.1(g), appellant adopts and incorporates the issues set forth in Co-Appellant Taylor's opening brief.

5. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Duprea Wilson with first degree manslaughter, two counts of first degree assault, two counts of first degree robbery, two counts of first degree kidnapping, first degree burglary, and three counts of second degree assault. CP 915-20. Qiuordai Taylor was charged as co-defendant. CP 915. The State alleged that Wilson or an accomplice was armed with a firearm for all but one of the second degree assault charges, for which it alleged Wilson or an accomplice was armed with a knife. CP 915-20.

The case proceeded to jury trial before the Honorable Kitty-Ann van Doorninck. The jury returned guilty verdicts and affirmative findings on the special verdicts. CP 1218-39. The court imposed a standard range sentence of 102 months on the manslaughter charge, and exceptional sentences of 0 months confinement on the remaining counts, plus firearm enhancements on counts I-X and a deadly weapon enhancement on count XI, for a total confinement of 666 months. CP 1273. The court found that Wilson's indigency and future incarceration made non-mandatory LFOs inappropriate and imposed only mandatory fines and costs. CP 1271. Wilson filed this appeal. CP 1281.

2. Substantive Facts

At around 9:00 on the evening of November 18, 2014, three men pushed their way into the home of Harry and Janice Lodholm when Mr.

Lodholm answered a knock at the door. RP 205, 208, 209. Mr. Lodholm was hit with what he believed was the butt of a gun, and he was pushed to the floor. He was hit again in the back of the head. RP 205. One of the men held him down and demanded weed, gold, and money. RP 207.

Mrs. Lodholm was in the bathroom getting ready for bed when she heard a knock and a loud noise. RP 277-78. She locked the bathroom door. RP 279. One of the men kicked the bathroom door open, and Mrs. Lodholm was hit with the door. The man was holding a knife, and when Mrs. Lodholm tried to move the knife away from her face, her hand was cut. RP 280-81. The man then punched her in the face and brought her to the living room, where she saw another man, who was holding a gun. RP 282. A third man was in the kitchen. RP 284. The man with the gun demanded weed, gold and money, then demanded her wallet and wedding ring. RP 285, 288. Mr. and Mrs. Lodholm were tied up with electrical cords while the men went through the house. RP 213, 292. At one point one of the men said, "just shoot her in the head," and another said "no, not yet." RP 214-15, 293.

Eventually, the three men left the house together. RP 214. Mr. Lodholm was able to untie himself quickly. He got up, closed and locked the front door, and then untied his wife. RP 215-16. He gave his wife his cell phone, told her to call 911, and sent her to the bedroom. RP 216.

There was one gunshot, either while Mr. Lodholm was in the living room or after he went to the bedroom, where he closed and locked the door. RP 216, 295, 315. He retrieved his pistol from a lock box in the bedroom, crouched behind the bed with his wife, and spoke to the 911 operator while aiming his gun at the bedroom door. RP 216.

Mr. and Mrs. Lodholm heard people coming down the hall toward the bedroom, and when one of them came through the bedroom door, Mr. Lodholm fired two shots. RP 221, 297-98. He shouted that he would shoot anyone who came into the bedroom. RP 221, 249, 298. The men then left the house. RP 222, 298.

Lakewood Police responded to the scene at 9:35 p.m. RP 146. Mr. and Mrs. Lodholm were removed from the house, interviewed briefly, and then taken to the hospital. RP 124-25, 329-313, 334.

During investigation of the scene police found a bullet lodged in the front door. RP 188. The bullet entered the door below the doorknob at a downward angle. RP 434-35.

Police found casings from the shots Mr. Lodholm had fired, but no bullet holes were found in the walls where the gun would have been aimed. RP 191. This led police to believe one or more suspect might have been hit. RP 191. A detective called surrounding hospitals looking for patients with unexplained gunshot wounds. RP 390.

Police found a backpack which did not belong to the Lodholms. RP 355-56. Inside the backpack were three cell phones. RP 358. Looking through the pictures on one of the phones an officer found the name Taijon Voorhees. RP 388. The cell phones were later identified as belonging to Voorhees, Duprea Wilson, and Qiuordai Taylor. RP 819, 856, 880, 951.

Lakewood police learned that a body had been found in an apartment complex parking lot in Federal Way with identification in the name of Taijon Voorhees. RP 394. Federal Way police had been dispatched to the scene at 10:45 in response to a 911 call reporting a series of shots and a body in the parking lot. RP 447-48. Police found no evidence that the shooting had occurred in the parking lot. RP 451. Voorhees was dead when police arrived. RP 608-09.

In the afternoon of November 19, Voorhees' girlfriend, Javonnie Adams, spoke with the Lakewood Police. RP 495-96. She said she was expecting Voorhees home the previous evening around 9:00. RP 477. When he did not return and she was not able to reach him, she reached out to his friend, Duprea Wilson. RP 477-78. Wilson asked her to meet him in the morning. RP 479. Adams said that when she met with Wilson, he told her that Voorhees had been shot. After leaving his body in a parking lot, Wilson called 911 and made up a story about hearing gunshots. RP

486-87. Adams said Wilson told her they had been in Lakewood to rob a weed dispensary but ended up robbing an old couple's house. He said three of them participated in the robbery. RP 488. Adams said Wilson told her that Voorhees had returned to the house to get his backpack. RP 489. Voorhees had tried to shoot the door down, but he was shot by the homeowner. RP 490. Adams said Wilson told her that when they drove away from the house, he knew Voorhees had been shot. Voorhees said it hurt, and he asked them to keep talking to him. RP 490-91. Adams said Wilson told her they did not take Voorhees to the hospital because they did not want to be questioned. He was dead by the time they dropped him off at the apartment complex in Federal Way. RP 491.

Wilson was arrested on an unrelated matter on November 19, 2014. RP 699. At the time of his arrest, he was wearing some jewelry, including the wedding ring taken from Mrs. Lodholm during the burglary. RP 674-75, 700. Wilson was also wearing a necklace and bracelet, which looked similar to jewelry worn by Qiuordai Taylor in a photograph posted on Facebook on November 17, 2014. RP 700, 719-20, 723. The bracelet and necklace were not related to the Lodholm burglary. RP 722. Taylor was identified as a suspect and arrested. RP 746.

C. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT TO CONVICT WILSON OF MANSLAUGHTER IT NEEDED TO FIND HE HAD A DUTY TO RENDER AID.

Wilson was charged with first degree manslaughter in the death of Taijon Voorhees. CP 915; RCW 9A.32.060(1)(a). The charge required the State to prove that Wilson recklessly cause the death of Taijon Voorhees. Id.

The Pierce County Medical Examiner testified at trial that Voorhees sustained two gunshot wounds. One bullet entered the left side of the abdomen and exited the ride side of the body without damaging any critical structures. RP 545-46, 548. The other bullet entered the front upper right thigh, severing the femoral artery. RP 546. The gunshot wound resulted in substantial blood loss and caused his death. RP 554, 559. The gunshot wound to the thigh would have been rapidly fatal. RP 563. With no attempt to stop the bleeding, he would have died within minutes. RP 563. Only if sufficient pressure had been applied to the leg wound and he had received medical attention at a hospital within ten minutes, would survival have been possible. RP 555.

Defense counsel argued that since Wilson did not inflict the gunshot wound that caused Voorhees' death, he could be held responsible

for the death only if he had a duty to render aid. RP 1014, 1029; CP 1122. Counsel moved to dismiss the manslaughter charge, arguing there was no evidence Wilson had a duty to render aid. CP 1121-23. The court noted that when Voorhees was in the car, he was away from a place where the public could help him, which would create a special duty on the driver of the car to render aid. RP 1043. Defense counsel argued that the duty needed to arise before the injury, which in this case was the shooting, and there was no evidence that Wilson did anything to increase the risk that Voorhees would be shot. RP 1044. The court said that keeping him in the car where he is unable to receive aid could be found to increase the harm, so whether there was a duty was a question of fact. RP 1044, 1046. The court denied the motion to dismiss, but said it was concerned about the manslaughter instructions. RP 1047.

The defense then proposed instructions which would inform the jury that recklessness or negligence for the purposes of first or second degree manslaughter in this case requires a finding of duty to render aid, which exists if the defendant creates or increases the risk of injury. CP 1073-78. The State argued that no instructions on duty were needed. Instead, the jury could convict if they found that reckless conduct on the part of the defendants was the proximate cause of Voorhees' death. Defense counsel maintained that the court still needed to instruct the jury

on duty, because Wilson could not be reckless in failing to act unless he had a duty to act. RP 1082-84.

The court declined to give an instruction on duty. It reasoned that the manslaughter charge was not based on failure to render or summon aid but on the conduct of driving around with Voorhees until he died, rather than taking him to a hospital. If the jury found that that conduct was the proximate cause of death and was reckless, it could convict Wilson of manslaughter. RP 1093, 1095. The court noted defense counsel's exception to the court's refusal to give the proposed instructions on duty. RP 1095.

An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct., 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

The proposed instructions on duty were supported by substantial evidence and accurately stated the law. Failure to summon aid may constitute reckless conduct sufficient for a manslaughter conviction if the

circumstances gave rise to a duty to summon aid. State v. Morgan, 86 Wn. App. 74, 79-81, 936 P.2d 20, review denied, 133 Wn.2d 1011 (1997).

In Morgan, the defendant was charged with manslaughter for recklessly failing to provide prompt medical attention for his wife, who suffered cardiac arrest due to an overdose of cocaine. There was evidence that Morgan provided the drugs and witnessed his wife's seizure but delayed calling 911. Once paramedics arrived, they were able to revive her, but she did not recover, and she died after being removed from life support. Morgan's motion to dismiss the manslaughter charge was denied.

On appeal, the Court noted that in order to convict Morgan of manslaughter, the State needed to show that his behavior surrounding his wife's death was reckless. It looked to whether he had a duty to summon medical aid for his wife. Although no Washington case had recognized such a duty, prior cases had recognized a violation of the parental duty to provide medical care for a child amounted to recklessness sufficient to support a charge of manslaughter. Morgan, 86 Wn. App. at 79-80 (citing State v. Norman, 61 Wn. App. 16, 26, 808 P.2d 1159, review denied, 117 Wn.2d 1018 (1991); State v. Williams, 4 Wn. App. 908, 915, 484 P.2d 1167 (1971)). Moreover, a Washington statute recognizes a spousal duty to provide medical attendance, and the Court of Appeals recognized that violation of this statutory duty could provide the recklessness necessary

for a manslaughter charge. Morgan, 86 Wn. App. at 80 (citing RCW 26.20.035).

The Morgan court also cited a California case which recognized a duty to summon aid if a person creates or increases the risk of injury to another. Morgan, 86 Wn. App. at 80 (citing People v. Oliver, 210 Cal.App.3d 138, 258 Cal.Rptr. 138, 143 (1989)). In Oliver, the defendant took her extremely intoxicated ex-husband home, helped him use heroin, dragged him behind her house when he became unconscious, and allowed him to die without calling for medical assistance. The court found the defendant's behavior created an unreasonable risk of harm and a duty to prevent that harm by summoning medical aid. Failing to summon aid was a breach of duty that made her responsible for his death. Oliver, 210 Cal.App.3d at 144. The Morgan court held that, as in Oliver, Morgan had a duty to summon medical aid if he helped place his wife in the position of needing aid. Violation of that duty amounted to recklessness sufficient to support the manslaughter charge. Morgan, 86 Wn. App. at 81.

As Morgan recognizes, where there is a duty to summon medical aid, a violation of that duty can be recklessness sufficient to support a charge of manslaughter. The State's theory in this case was that Wilson was reckless in driving around with Voorhees after he was shot instead of securing medical aid. The defense theory was that the circumstances did

not create a duty to provide medical aid, and therefore failing to provide aid did not constitute recklessness. In order to determine whether Wilson's conduct was reckless, the jury needed to be instructed on duty.

Although defense counsel could argue that Wilson's conduct did not create or increase the risk of injury to Voorhees, because the jury was not instructed regarding when a duty to summon aid arises, the instructions were not sufficient to support the defense theory. The court's failure to give instructions which make the relevant law clear is not excused merely because the defense had the opportunity to argue its theory of the case to the jury. "[T]he defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is." State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996).

The court's refusal to give the proposed instructions on duty denied Wilson his right to a fair trial by an adequately instructed jury. Wilson's manslaughter conviction should be reversed and the case remanded for a new trial.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS OF FIRST DEGREE ASSAULT.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14;

Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Wilson was charged with two counts of first degree assault, alleging that with intent to cause great bodily harm he intentionally assaulted Mr. and Mrs. Lodholm with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death. CP 915-16; RCW 9A.36.011(1)(a). These two charges were based on the single gunshot to the front door of the house. The prosecutor argued that whoever fired the gun was trying to hit both Mr. and Mrs. Lodholm. RP 1030.

There was no evidence which would support a finding that the gun was fired into the front door with the intent to cause great bodily harm, however. The evidence showed that a single bullet entered the front door at a downward angle, impacting the door below the handle. RP 434-35.

Although the Lodholms had been lying on the floor of the living room when the men left the house, there was no reason to believe they were still on the floor where they might be injured if the bullet had penetrated the door. The evidence showed that the men had left the door open, but Mr. Lodholm and gotten up and closed and locked the door. RP 215-16. Since the door that had been opened was now closed and locked, there was no reason to believe that the couple were in still on the floor or that firing into the door at a downward angle, striking below the handle, would injure Mr. or Mrs. Lodholm. The gunshot is not evidence of intent to cause great bodily harm, and no other evidence was introduced to establish that element of the offense. The only reasonable inference from the evidence is that whoever fired the gun was aiming and the lock in an attempt to open the door, which is consistent with what Adams testified Wilson told her. RP 490.

The State failed to prove that the gun was fired into the front door with the intent to cause great bodily harm, and the two convictions of first degree assault, and the firearm enhancements based on those convictions, must be dismissed. See State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005)(retrial following reversal for insufficient evidence is prohibited; dismissal is the remedy).

3. THE STATE FAILED TO PROVE A NEXUS BETWEEN WILSON, A FIREARM, AND THE OFFENSE OF MANSLAUGHTER, AND THE FIREARM ENHANCEMENT FOR THAT OFFENSE MUST BE VACATED.

Wilson moved to dismiss the firearm enhancement on the manslaughter charge, arguing that there was no nexus between the firearm and the crime. The State's theory was that Wilson and Taylor were reckless in failing to take Voorhees to the hospital after he was shot by Mr. Lodholm. There was no evidence that a gun was used to further that conduct. Even if the evidence supported an inference that the gun used in the burglary was in the car, mere proximity to the weapon is not enough, and there was no connection between the gun and the charged reckless conduct. Sentencing RP 5-6, 12; CP 1249-50. The court ruled that there was a reasonable inference they took the gun with them when they left the Lodholms' house and that the gun was being used the whole time they were driving around. It denied the motion to dismiss. Sentencing RP 12-13.

Under RCW 9.94A.533(3), the State is permitted to enhance an offender's sentence if the offender or an accomplice was armed with a firearm during the commission of the crime. A person is armed with a firearm if it is "easily accessible and readily available for either offensive or defensive purposes." State v. Valdobinos, 122 Wn.2d 270, 282, 858

P.2d 199 (1993). The State must prove a nexus between the defendant, the crime, and the weapon. State v. Willis, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005). Whether a person is armed is a mixed question of law and fact which is reviewed de novo. State v. Schelin, 147 Wn.2d 562, 565, 55 P.3d 632 (2002); State v. Johnson, 94 Wn. App. 882, 892, 974 P.2d 855 (1999).

In determining whether a defendant is armed, the court "should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g. whether in the open, in a locked or unlocked container in a closet on a shelf, or in a drawer)." Schelin, 147 Wn.2d at 570; see also State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005) (pistol found in backpack in trunk of car was not readily available and therefore defendant was not armed during crime). In this case, no gun was ever found. There was evidence that a gun had been used in the robbery, and the State's theory was that the men must have taken the gun with them when they left. There was no evidence as to where the gun might have been if it were present, whether it was in the passenger area, in the trunk, or in a locked container.

But a person is not armed merely because a firearm is present during the commission of the crime. Schelin, 147 Wn.2d at 570 (mere presence of weapon is not sufficient to impose a firearm enhancement).

There must also be a nexus between the defendant, the firearm, and the crime. The Supreme Court has rejected the proposition that any possession of a deadly weapon during an ongoing crime shows a nexus between the weapon and the crime. State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007). A person is not armed merely by owning or possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Without this nexus requirement, courts run the risk of punishing the defendant under a firearm enhancement for having a weapon unrelated to the crime. Willis, 153 Wn.2d at 372. That is the case here.

The State's theory here was that Wilson acted recklessly in driving around with Voorhees after he had been shot, rather than taking him to a hospital. There was no evidence connecting the gun that might have been in the car to this conduct, however. The only evidence as to what occurred in the car came from Adams, who testified that Wilson told her Voorhees had said he was in pain and asked them to keep talking to him, and they did not go to the hospital because they did not want to be questioned. RP 490-91. Adams did not mention the presence or use of a gun. This evidence does not support a finding that a gun was easily accessible or readily available; it does not establish either that a weapon was used or that it was there to be used during the conduct alleged to constitute

manslaughter. Without this necessary nexus between Wilson, the gun, and the crime, the firearm enhancement must be dismissed. See Gurske, 155 Wn.2d at 138, 144 (where the weapon is not actually used in the commission of the crime, it must be there to be used).

4. WILSON ADOPTS AND INCORPORATES THE ARGUMENTS MADE BY CO-APPELLANT TAYLOR.

Pursuant to RAP 10.1(g), Wilson adopts and incorporates the arguments set forth in the opening brief of Co-Appellant Taylor.

5. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Wilson was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 1287-88. In addition, the trial court found Wilson was unlikely to have the ability to pay LFOs in the future and imposed only the mandatory LFOs. CP 1271.

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent

criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case."

Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Wilson has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone

cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that

the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Wilson respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. **Alternatively, this court should remand for superior court fact-finding to determine Wilson's ability to pay.**

In the event this court is inclined to impose appellate costs on Wilson should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can

present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Wilson to assist him in developing a record and litigating his ability to pay.

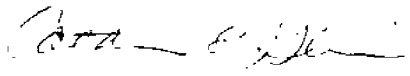
If the State is able to overcome the presumption of continued indigence and support a finding that Wilson has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

For the reasons discussed above, this court should reverse the manslaughter conviction, reverse and dismiss the first degree assault convictions, and vacate the firearm enhancement on the manslaughter conviction. In addition, this Court should grant the relief requested in Taylor's brief. This Court should decline to impose appellate costs should the State substantially prevail on appeal.

DATED October 31, 2016.

Respectfully submitted,



CATHERINE E. GLINSKI
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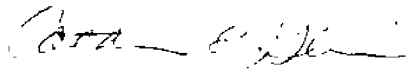
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in *State v. Duprea Wilson*, Cause No. 48796-9-II as follows:

Duprea Wilson DOC# 369416
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
October 31, 2016

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Transmittal Letter

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